Supreme Court of the United States.

No. 22.—October Term, 1904.

Richard C. Crawford et al., Plaintiffs in Error, vs. John E. Burke. } In error to the Supreme Court of the State of Illinois.

[November 7, 1904.]

This was an action in trover instituted September 10, 1897, in the Circuit Court of Cook County, Illinois, by Burke against Crawford & Valentine, plaintiffs in error, to recover damages for the wilful and fraudulent conversion of certain reversionary interests of the plaintiff in 550 shares of Metropolitan Traction stock.

There were ten counts in the declaration. In each of the first five counts it was alleged that the defendant firm of Crawford & Valentine were stock brokers and dealers in investment securities; that plaintiff employed the defendants as his brokers and agents to buy, hold and carry stocks for him subject to his order; that defendants had in their possession, or under their control, certain shares of the capital stock of the Metropolitan Traction Company, which they were holding as a pledge and security for the amount due them from the plaintiff on said stock; that defendants wrongfully, wilfully and fraudulently, and without his knowledge or consent, sold said shares of stock, and wilfully and fraudulently, and with intent to cheat and defraud the plaintiff, converted plaintiff's reversionary interest in said stock to their use, whereby it was wholly lost.

In each of the last five counts it was alleged that after defendants had wrongfully and fraudulently, and without plaintiff's knowledge or consent, sold the plaintiff's stock and converted the proceeds of such sales to their own use, they falsely and fraudulently represented to him that they still had the stock on hand and were carrying it for him; that their correspondents in Philadelphia, where the stock had been bought, were calling upon them for further demands or margins, and that it therefore became necessary to call upon the plaintiff to make further payments on the stock in order to comply with their correspondents' demands and to be secured against loss. It was averred in each of said counts that such representations were false and fraudulent, and by means thereof defendants obtained from the plaintiff the aggregate sum of $10,800.

To this declaration defendants pleaded not guilty, upon which issue was joined January 4, 1900, and on May 12, 1900, a jury trial was waived in writing. The case rested without action until January 3, 1901, when

defendants filed their separate pleas of *puis darrein continuance*, setting up that on April 5, 1900, the defendants had received their discharge in bankruptcy, in the District Court for the Northern District of Illinois, and that plaintiff's claims were provable and not excepted from the operation of such discharge. The plaintiff replied denying that his claim was provable, and averred that the same was excepted from such operation.

Notwithstanding the plea of *puis darrein continuance*, the plaintiff introduced evidence and proved the allegations in his declaration and the amount of damages he had sustained. Defendants were found guilty upon all the counts and judgment entered against them.

The case was taken to the appellate court, where it appearing that one of the justices had taken part in the trial of the case below, and that the two remaining justices were unable to agree upon the case, the judgment of the Circuit Court was affirmed. The judgment of the appellate court was also affirmed by the Supreme Court of Illinois, (201 Ill. 581,) to review which judgment this writ of error was sued out.

Mr. Justice BROWN delivered the opinion of the Court.

A year after this case was put at issue, and upon the opening of the trial, defendants filed their separate pleas *puis darrein continuance*, setting up their discharge in bankruptcy, and averring that plaintiff's claim was a provable debt, and the discharge a complete defense.

It is a well-settled principle of law, and was so held by the Supreme Court of Illinois in this case, that a plea *puis darrein continuance* waives all prior pleas, and amounts to an admission of the cause of the action set up in the plaintiff's declaration. (*Mount* v. *Scholes*, 120 Ill. 394; *East St. Louis* v. *Renshaw*, 153 Ill. 491; *Angus* v. *Trust & Savings Bank*, 170 Ill. 298; *Kimball* v. *Hutchinson*, 10 Wend. 675.)

But notwithstanding this, plaintiff was permitted to introduce evidence in proof of the fraud alleged in his declaration; and upon the conclusion of the trial the court found there had been a conversion of plaintiff's reversionary interest in the stock, for which he "had a right to recover in trover," and that it was not such a debt as was barred by the bankruptcy act. Upon appeal to the Supreme Court it was held that it was not necessary to the judgment to decide whether the allegations of the declaration were admitted by the pleadings, as they were established by the proof which had been adduced by plaintiff, "and the propositions held as law on that branch of the case being correct, judgment for plaintiff necessarily follows." That court also held that the case, being one of fraud, was not covered by the defendants' discharge in bankruptcy.

The only Federal question involved in the case is whether the Supreme Court of Illinois gave the proper effect to the discharge pleaded by the de-

fendants. If plaintiff's claim was not a provable debt, or was expressly excepted from the operation of the discharge, the decision of that court was right, but if it was covered by the discharge such discharge was a complete defense.

Section 17 of the bankruptcy act of 1898 contains, among other things, the following provisions:

"SEC. 17. A discharge in bankruptcy shall release the bankrupt from all of his provable debts except such as . . . (2) are judgments in actions for frauds,, or obtaining property by false pretences, or false representations, or for wilful and malicious injuries to the property or person of another . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity."

Under this section, whether the discharge of the defendants in bankruptcy shall operate as a discharge of plaintiff's debt, it not having been reduced to judgment, depends upon the fact whether that debt was "provable" under the bankruptcy act, that is, susceptible of being proved; second, whether it was or was not created by defendants' fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

1. Provable debts are defined by section 63, a copy of which appears in the margin.* Paragraph *a* of this section includes debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph *b*, two constructions are possible: It may relate to all unliquidated demands or only to such as may arise upon such contracts, express or implied, as are covered by paragraph *a*.

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*SEC. 63. DEBTS WHICH MAY BE PROVED.—(*a*) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt, who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) *founded upon an open account, or upon a contract, express or implied;* and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

(*b*.) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Certainly paragraph *b* does not embrace debts of an unliquidated character and which in their nature are not susceptible of being liquidated. (*Dunbar* v. *Dunbar*, 190 U. S. 340, 350.) Whether the effect of paragraph *b* is to cause an unliquidated claim which is susceptible of liquidation but is not literally embraced by paragraph *a*, to be provable in bankruptcy, we are not called upon to decide, as we are clear that the debt of the plaintiff was embraced within the provision of paragraph *a*, as one "founded upon an open account, or upon a contract, express or implied," and might have been proved under section 63*a* had plaintiff chosen to waive the tort, and take his place with the other creditors of the estate. He did not elect to do this, however, but brought an action of trover, setting up a fraudulent conversion of his property by defendants. In the first five counts of his declaration he charges a fraudulent conversion of his interest in the stock, and in the last five counts that the defendants had induced him to make further payments on such stock in the way of margins, by false and fraudulent representations.

The question whether the claim thus set forth is barred by the discharge depends upon the proper construction of section 17, which declares that the discharge in bankruptcy relieves the bankrupt from all of his "provable debts" except such as ". . . (2) are judgments in actions for frauds, or obtaining property by false pretences, or false representations, or for wilful and malicious injuries to the property or person of another . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity."

Do these words apply to all debts created by the fraud, embezzlement misappropriation of the bankrupt, or only to such as were created while he was acting as an officer or in some fiduciary capacity? The fact that the second subdivision of section 17 excepted from the discharge "all *judgments* in actions for frauds, or of obtaining property by false pretences, or false representations," indicates quite clearly that as to frauds in general it was the intention of Congress only to except from the discharge such as had been reduced to judgment, unless they fall within the fourth subdivision, of those created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in a fiduciary capacity. Unless these words relate back to all the preceding words of the subdivision, namely, the frauds and embezzlements, as well as misappropriations or defalcations, it results that the exception in subdivision 2 of all judgments for fraud is meaningless, since such judgments would be based upon a fraud excepted from discharge by subdivision 4, whether judgment had been obtained or not.

This conclusion is fortified by reference to corresponding sections of the former bankrupt acts. Thus, by the first section of the act of 1841 (5

Stat. 440) the benefits of that act were extended to all persons owing debts "which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." It is entirely clear that under this section a discharge was not denied to the bankrupt by reason of debts fraudulently contracted, but only to such as were created by his defalcation as an officer, or while acting in a fiduciary capacity.

We may remark here in passing that ever since the case of *Chapman* v. *Forsyth*, (2 How. 202,) this court has held that a commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him. This rule was made under the bankruptcy act of 1841, and has since been repeated many times under subsequent acts. (*Neal* v. *Clark*, 95 U. S. 708; *Hennequin* v. *Clews*, 111 U. S. 679; *Noble* v. *Hammond*, 129 U. S. 68; *Upshur* v. *Briscoe*, 135 U. S. 375, as well as in cases in the State courts too numerous for citation.)

Under the bankruptcy act of 1867 the list of debts excluded from the operation of the discharge was considerably larger. In section 33, Revised Statutes, 5117, it was declared that—

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

The language of this section is so clear as to require no construction. It is plain and explicit to the effect that the fraud and embezzlement of the bankrupt need not have been committed by him while acting as an officer or in a fiduciary character, and that this character relates only to his defalcation. But under the act of 1898 there is no such severance, in the fourth paragraph as would authorize us to say that the term "fiduciary capacity" did not extend back to the words "fraud, embezzlement and misappropriation." It was the opinion of the Supreme Court of Illinois that "a mere change in phraseology, apparently for the sake of brevity, rendering the meaning somewhat obscure, cannot be regarded as showing a legislative intent to depart so radically from precedents established by previous bankruptcy legislation and judicial decisions, as to provide that debts created by fraud or embezzlement of the bankrupt should be released by his discharge in bankruptcy, unless such fraud or embezzlement should be committed while the bankrupt was acting as a public officer, or in a fiduciary capacity."

Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and that Congress would not have used such different language in section 17 from that used in section 33 of the act of 1867,

without thereby intending a change of meaning. The view generally taken by the bankruptcy courts has been that the terms "officer" and "fiduciary capacity" extend to all the claims mentioned in paragraph 4, and are not confined to cases of defalcation. (*In re Rhutassel*, 96 Fed. Rep. 599; *In re Lewensohn*, 99 Fed. Rep. 73; *In re Hirschman*, 104 Fed. Rep. 69; *In re Cole*, 106 Fed. Rep. 837; *In re Freche*, 109 Fed. Rep. 620; *Hargadine-McKittrick Dry Goods Co.* v. *Hudson*, 111 Fed. Rep. 361.) The cases in the State courts are almost uniformly to the same effect. This is the natural and grammatical reading of the clause.

Thus in *Smith & Wallace Co.* v. *Lambert*, (69 N. J. Law 487,) the defendant pleaded to an action on a book account his discharge in bankruptcy, to which the plaintiff replied that the cause of action was created by the fraud of the defendant. The Supreme Court of New Jersey held the replication to be insufficient. "We think," said the court, "that under section 17 of the bankrupt law, to which reference has been made, there is no provision that would except from the discharge the debt upon which the present suit is brought."

In *Morse* v. *Kauffman*, (100 Va. 218,) it was pleaded against the discharge that the goods were procured by false pretenses. After holding that the case had not fallen within subdivision 2 of section 17, as there was no judgment for fraud, the Supreme Court of Virginia observed:

"It would seem to be equally clear that the demand of plaintiffs in error is not within the exception of subdivision 4 of section 17. It is not pretended that the claim was created by the bankrupt's fraud, embezzlement, misappropriation or defalcation while acting as an officer, or in any fiduciary capacity."

"The contention that 'fraud' should be segregated from the qualifying language 'while acting as an officer or in any fiduciary capacity' is without merit. Such interpretation would not only destroy the grammatical construction of the sentences and contravene its plain meaning, but it would likewise be inconsistent with paragraph 2 of the same section—that a creditor should have obtained judgment in an action for fraud in order to override a discharge in bankruptcy."

A like construction was given to subdivision 4 by the Supreme Court of Missouri in *Goodman* v. *Herman*, (172 Mo. 344,) by the Supreme Court of Minnesota in *Gee* v. *Gee*, (84 Minn. 384,) by that of Rhode Island in *Crosby* v. *Miller*, (25 R. I. 172,) and by the Supreme Court of New York, fourth department, in *In re Bullis*, (73 N. Y. Supp. 1047.) In this case the question was discussed at considerable length, the court saying:

"If *any* debt created by fraud, embezzlement or misappropriation is to be excepted from the application of the statute, then there is no necessity for subdivision 2, making a judgment essential to prevent the granting of the discharge under the statute."

We have not overlooked the fact that the New York Supreme Court of the first department reached a different conclusion in *Frey* v. *Torrey*, (70

App. Div. 166, affirmed by the Court of Appeals in a *per curiam* opinion, 175 N. Y. 501,) but so far as we know this is the only case that supports the construction given to section 17 by the Supreme Court of Illinois.

Why an ordinary claim for fraud should be released by the discharge, while a judgment for fraud is not released, is not altogether clear, although this distinction may have been created to avoid the necessity of going into conflicting evidence upon the subject of fraud; while in cases of judgments for frauds the judgment itself would be evidence of the fraudulent character of the claim. If a creditor has a claim against a debtor for goods sold which would ordinarily be covered by a discharge in bankruptcy, he is strongly tempted to allege, and if possible to prove, that the goods were purchased under a misrepresentation of the assets of the buyer, and thus to make out a claim for fraud which would not be discharged in bankruptcy. It was probably this contingency which induced Congress to enact that an alleged fraud of this kind should be reduced to judgment before it could be set up in bar of a discharge.

The intent of Congress in changing the language of the act of 1867 seems to have been to restore the act of 1841, which, as already observed, extended the benefits of the law to every debtor who had not been guilty of defalcation as a public officer or in a fiduciary capacity, the act of 1898 adding, however, to the excepted class those against whom a judgment for fraud had been obtained.

Some stress is laid by the Supreme Court of Illinois upon the punctuation of subdivision 4, section 17, presumably upon the insertion of a comma after the word "misappropriation," thereby indicating a severance of that which precedes from that which follows. While we do not deny that punctuation may shed some light upon the construction of a statute, (*Joy* v. *St. Louis*, 138 U. S. 1, 32,) we do not think it is entitled to weight in this case. In the enumeration of persons or things in acts of Congress it has been the custom for many years to insert a comma before the final "and" or "or" which precedes the last thing enumerated, apparently for greater precision, but without special significance. So little is punctuation a part of statutes that courts will read them with such stops as will give effect to the whole. (*Doe* v. *Martin*, 4 J. R. 65; *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 84; *United States* v. *Lacher*, 134 U. S. 624, 628; *United States* v. *Isham*, 17 Wall. 496.)

2. But it is strenuously insisted by the plaintiff that a claim for the conversion of personal property is not within the scope of section 17; because it is not a "provable debt" within the definition of section 63*a*. Did the latter section stand alone, there would be some ground for saying that a claim, though "founded upon an open account, or upon a contract, express or implied," would not be a provable debt, if plaintiff elected to treat the

conversion as fraudulent and sue in trover, though he might have chosen to waive the tort and bring an action for a balance due on account. An early English case, *Parker* v. *Crole*, (5 Bingham, 63,) is cited to the effect that the operation of the discharge is determined by the election of the creditor to sue in assumpsit or case. A like ruling was made in certain cases under the bankruptcy acts of 1841 and 1867. (*Williamson* v. *Dickens*, 27 N. C. 259; *Oliver* v. *Hughes*, 8 Penn. St. 426; *Bradner* v. *Strang*, 89 N. Y. 299–307.)

But we think that section 63*a*, defining provable debts, must be read in connection with section 17, limiting the operation of discharges, in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to judgment, or which were committed by the the bankrupt while acting as an officer, or in a fiduciary capacity. If no fraud could be made the basis of a provable debt, why were *certain* frauds excepted from the operation of a discharge? We are, therefore, of opinion that if a debt originates or is "founded upon an open account or upon a contract, express or implied," it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover as for a fraudulent conversion, instead of in assumpsit for a balance due upon an open account. It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63*a*. It results from the construction we have given the latter section that all debts originatiug upon an open account or upon a contract, express or implied, are provable, though plaintiff elect to bring his action for fraud.

In the case under consideration defendants purchased, under the instructions of the plaintiff, certain stocks and opened an account with him, charging him with commission and interest, and crediting him with amounts received as margins. Subsequently, and without the knowledge of the plaintiff, they sold these stocks, and thereby converted them to their own use. Without going into the details of the facts, it is evident that the plaintiff might have sued them in an action on contract, charging them with the money advanced and with the value of the stock; or in an action of trover based upon their conversion. For reasons above given, we do not think that his election to sue in tort deprived his debt of its provable character, and that as there is no evidence that the frauds perpetrated by the defendants were committed by them in an official or fiduciary capacity, plaintiff's claim against them was discharged by the proceedings in bankruptcy.

The judgment of the Supreme Court of Illinois is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.